A

Muniandy a/l Subramaniam v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B05–81 OF 1998

B ABDUL KADIR SULAIMAN, MOHD GHAZALI YUSOFF AND TENGKU BAHARUDIN SHAH JJCA

14 SEPTEMBER 2006

C *Criminal Procedure — Prosecution — Prima facie case — Pre s 180 amendment — Whether trial judge's finding of prima facie case beyond reasonable doubt was misdirection — Criminal Procedure Code s 180*

D *Criminal Procedure — Prosecution — Prosecution's case — Speech by prosecution — Speech made references to cautioned statement which was later held to be inadmissible — Whether inclusion of cautioned statement in appeal record fatal*

E *Evidence — Circumstantial evidence — Murder — Whether circumstantial evidence corroborated — Whether there was complete chain of circumstantial evidence which linked appellant beyond reasonable doubt with act of killing*

F The appellant was charged for the murder of the deceased under s 302 of the Penal Code. The evidence showed that the deceased and her twin sister, PW1 stayed at their residence with their mother, PW2. The appellant was the nephew of PW7, the father of the deceased. In April 1996, the appellant borrowed some gold trinkets from PW2, but failed to return them to PW2 within a week as promised. On 30 May 1996, at about 2.20pm, PW1 found the deceased lying on the floor of her bedroom in a pool of blood with her face covered with a sarong. PW2 testified that when she

G left for work on the day of the incident, the deceased was wearing a chain, a locket, a bangle and a ring. When she returned home later, she found several pieces of her jewellery which she kept in her cupboard situated in her bedroom in the residence missing. Evidence of a pawnshop's records was tendered to show that these items were pawned by the appellant on the day of the incident. PW7 testified that he had a

H telephone conversation with the deceased earlier that day, and the deceased told him that she was unable to come down to meet him as the appellant was in the residence with her. The learned trial judge's transcript of the notes of proceedings in relation to the charge read as follows: 'Prima facie case is established. Beyond reasonable doubt. The OKT is called to enter defence.'

I The appellant elected to remain silent when he was called on to enter on his defence and informed the court that he did not wish to call any witness. At the conclusion of the trial the appellant was found guilty of murder as charged and was sentenced to death. The appellant appealed. The defence argued that: (1) the case was a pre-amendment case, viz prior to the amendment of, inter alia, s 180 of the Criminal Procedure Code ('the CPC') and hence the case of *Arulpragasan a/l Sandaraju v PP*

[1997] 1 MLJ 1 would apply; therefore, the finding of the learned trial judge as found in the transcript of the notes of proceedings itself was a misdirection as there could not have a prima facie case beyond reasonable doubt; (2) the entire case was based on circumstantial evidence and the circumstantial evidence was not beyond reasonable doubt; (3) the opening speech of the learned deputy public prosecutor ('the DPP') referred to the appellant's cautioned statement which had been ruled as inadmissible by the learned trial judge and hence should not form part of the appeal record; and (4) PW7's evidence of his telephone conversation with the deceased, viz, that she was unable to come down to meet him as the appellant was in the residence was inadmissible under s 32 of the Evidence Act 1950.

Held, dismissing the appeal:

(1) The appellant was charged with committing the offence of murder on 30 May 1996 and hence, s 180 of the CPC prior to its amendment would apply (see para 20). The learned judge's use of the word 'prima facie' in his transcript of his notes was not fatal when his grounds of judgment clearly showed he understood what was required of him under s 180 of the CPC as it then was and that he religiously followed the decision of Arulpragasan which was clearly binding on him. Thus, a judge sitting alone under s 180 of the CPC must subject the prosecution evidence to maximum evaluation at the close of the case for the prosecution and ask himself the question, viz, if he decides to call upon the accused to enter his defence and he elects to remain silent, is he prepared to convict him on the totality of the evidence contained in the prosecution's case. This, according to Arulpragasan, is the requirement of the s 180 of the CPC. The learned trial judge had, at the close of the case for the prosecution, made an evaluation of all the admissible evidence as adduced relevant to the charge of murder under s 302 of the Penal Code. He then found that the prosecution had proved every ingredient of the charge of murder and hence had made out against the appellant a case which if unrebutted would warrant his conviction. That was when he called upon the appellant to enter on his defence (see para 26); *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1 followed.

(2) The totality of the evidence, adding them together and considering them altogether, lead to the irresistible conclusion that it was the appellant who committed the crime. The court could not find any other reasonably possible explanation. The learned trial judge was correct in arriving at the decision that he did when he called on the appellant to enter on his defence. The learned trial judge pointed out in his judgment that there was a complete chain of circumstantial evidence which linked the appellant beyond reasonable doubt with the act of killing and established the offence charged. His judgment indicated that he viewed the evidence as a whole (see para 32).

(3) The statement made by the deceased to PW7, viz, that she could not come downstairs to meet him as the appellant was in the residence was by itself a relevant fact and to that effect became relevant under the express provisions of s 32(1)(a) of the Evidence Act 1950 (see para 35). PW7's evidence was not

hearsay and was admissible as it was proposed to establish the fact that the statement, ie that the appellant was in the residence, was made and not the truth of the statement (see para 36).

(4) The evidence that showed that the jewellery found missing were pawned by the appellant would constitute corroboration. The evidence confirmed in material particulars that the appellant was there in the residence. His presence in the residence on the day of the incident was sufficiently proven by this evidence (see para 39).

(5) The learned DPP had carried out what was required of him pursuant to s 179(1) of the CPC. His speech was based upon what was contained in the investigation papers that was available to him and he was clearly not in a position to anticipate whether the court would admit or reject the cautioned statement. In the course of the trial, the learned trial judge ruled that it was inadmissible. Having done so the learned trial judge never referred to the cautioned statement or its contents in his grounds of judgment as it clearly did not form part of the case for the prosecution, it being ruled to be inadmissible. Before the court, the learned DPP never referred to the cautioned statement neither did this court give any due consideration to it as it was a piece of inadmissible evidence. The cautioned statement was inadvertently included in the appeal record and as such was a non-issue (see para 42).

(6) There was overwhelming evidence on the record that the appellant murdered the deceased. The learned trial judge had drawn the proper inferences from the prosecution's evidence and had given adequate reasons as to why he called on the appellant to enter on his defence. The evidence in its totality confirmed in material particulars that it was the appellant who murdered the deceased. He remained silent and did not call any witness. Thus there was no rebuttal evidence. No miscarriage of justice had occurred in this case (see para 49).

[Bahasa Malaysia summary

Perayu dituduh membunuh si mati di bawah s 302 Kanun Keseksaan. Keterangan menunjukkan yang si mati dan saudara kembarnya, PW1 tinggal di kediaman mereka bersama-sama dengan ibu mereka, PW2. Perayu adalah anak saudara PW7, ayah si mati. Dalam bulan April 1996, perayu meminjam beberapa barang kodi emas dari PW2, tetapi gagal untuk memulangkannya kepada PW2 dalam masa seminggu sebagaimana yang telah dijanjikan. Pada 30 Mei 1996, lebih kurang jam 2.20petang, PW1 menjumpai si mati terbaring dalam lumuran darah di atas lantai di dalam bilik tidurnya dengan mukanya ditutupi oleh sehelai kain sarung. PW2 memberi keterangan bahawa semasa beliau meninggalkan rumah untuk pergi kerja pada hari kejadian tersebut, si mati memakai seutas rantai, sebuah loket, seutas gelang dan sebentuk cincin. Apabila beliau kembali ke rumah, beliau mendapati beberapa barang kemasnya yang disimpannya di dalam almari di bilik tidurnya juga telah hilang. Keterangan dikemukakan menunjukkan rekod kedai pajak gadai yang bahawa perayu telah menggadaikan barang-barang tersebut pada hari kejadian itu. PW7 memberi keterangan yang beliau telah membuat satu perbualan telefon dengan si mati pada awal hari tersebut, dan si mati telah memberitahunya bahawa beliau (si mati) tidak dapat turun untuk berjumpa dengan PW7 kerana perayu berada

di dalam rumah tersebut bersama-sama dengan si mati. Transkrip yang arif hakim mengenai nota-nota prosiding berhubung dengan pertuduhan ini berbunyi demikian: 'Kes Prima facie telah ditunjukkan. Melepasi keraguan munasabah. OKT dipanggil untuk memasukkan pembelaan'.

Perayu memilih untuk berdiam diri apabila beliau dipanggil untuk memasukkan pembelaan dan memberitahu mahkamah yang beliau tidak mahu memanggil sebarang saksi. Pada penghujung perbicaraan perayu didapati bersalah atas pertuduhan membunuh dan diberi hukuman mati. Perayu merayu. Pembela menghujahkan bahawa: (1) kes ini adalah satu kes sebelum pindaan, iaitu sebelum pindaan, s 180 Kanun Prosedur Jenayah ('CPC') dan maka kes Arulpragasan a/l Sandaraju v PP [1997] 1MLJ 1 terpakai; oleh yang demikian, keputusan yang arif hakim sebagaimana yang terdapat di dalam transkrip nota-nota prosiding tersebut adalah satu salah arah kerana tiada satu kes prima facie yang melampaui keraguan munasabah; (2) keseluruhan kes ini adalah didasarkan pada keterangan ikut keadaan dan keterangan ikut keadaan adalah tidak melampaui keraguan munasabah; (3) pembukaan hujahan yang arif timbalan pendakwa raya ('DPP') yang merujuk kepada pernyataan beramaran perayu yang mana telah diputuskan tidak boleh terima oleh yang arif hakim dan maka tidak patut menjadi sebahagian dari rekod rayuan; dan (4) keterangan PW7 mengenai perbualan telefonnya dengan si mati, iaitu beliau tidak dapat turun untuk berjumpa dengan PW7 kerana perayu berada di dalam kediaman tersebut adalah tidak boleh terima di bawah s 32 Akta Keterangan 1950.

Diputuskan, menolak rayuan:

(1) Perayu dituduh melakukan satu kesalahan membunuh pada 30 Mei 1996 maka, s 180 CPC sebelum pindaan adalah terpakai (lihat perenggan 20). Penggunaan perkataan 'prima facie' oleh yang arif hakim di dalam transkrip nota-notanya adalah tidak fatal apabila alasan-alasan penghakimannya jelas menunjukkan yang beliau faham apa yang diperlukan darinya di bawah s 180 CPC yang terdahulu dan beliau secara teliti mengikuti keputusan Arulpragasan yang mana jelas mengikatnya. Oleh yang demikian, seorang hakim yang bersidang sendirian di bawah s 180 CPC mestilah menilai keterangan pendakwa secara maksima pada akhir kes pendakwa dan menyoal dirinya, iaitu, jika beliau memutuskan untuk memanggil tertuduh untuk memasukkan pembelaan dan yang tertuduh memilih untuk berdiam diri, adakah beliau bersedia untuk mensabitkan tertuduh berdasarkan pada kesemua keterangan yang terkandung di dalam kes pendakwaan. Ini, mengikut Arulpragasan, adalah keperluan s 180 CPC. Yang arif hakim telah, pada akhir kes pendakwaan, telah membuat penilaian kesemua keterangan-keterangan boleh terima yang relevan yang dikemukakan berhubung dengan pertuduhan bunuh di bawah s 302 Kanun Keseksaan. Beliau mendapati bahawa pendakwa telah membuktikan kesemua ciri-ciri pertuduhan bunuh, maka jika ianya tidak disangkal oleh perayu, ia boleh membawa kepada sabitan pertuduhan tersebut. Pada ketika itulah beliau memanggil perayu untuk memasukkan pembelaan (lihat perenggan 26); *Arulpragasan a/l Sandaraju v PP* [1997] 1 MLJ 1 diikut.

(2) Keterangan secara keseluruhan, dilihat dan dipertimbangkan bersama, membawa kepada kesimpulan yang tidak dapat dibendung yang bahawa

perayu telah melakukan jenayah tersebut. Mahkamah tidak dapat mencari penjelasan lain yang munasabah. Yang arif hakim adalah betul dalam mencapai keputusannya apabila beliau memanggil perayu untuk memasukkan pembelaan. Yang arif hakim menyatakan di dalam penghakimannya bahawa terdapat satu rangkaian keterangan ikut keadaan yang lengkap di mana ia mengaitkan perayu dengan perbuatan membunuh dan pertuduhan tersebut melampaui keraguan yang munasabah. Penghakimannya menunjukkan yang beliau telah melihat kepada keterangan-keterangan secara keseluruhan (lihat perenggan 32).

(3) Pernyataan yang dibuat oleh si mati kepada PW7, iaitu, beliau tidak dapat turun untuk berjumpa dengan PW7 kerana perayu berada di dalam rumah tersebut adalah satu fakta relevan di bawah peruntukkan s 32(1)(a) Akta Keterangan 1950 (lihat perenggan 35). Keterangan PW7 bukannya dengar cakap dan ianya boleh terima kerana ia bertujuan untuk membuktikan fakta pernyataan iaitu perayu berada di dalam kediaman tersebut, dibuat dan bukannya kebenaran pernyataan tersebut (lihat perenggan 36).

(4) Keterangan menunjukkan bahawa barang-barang kemas yang hilang telah digadai oleh perayu dan ini merupakan satu sokongan. Keterangan mengesahkan butiran material yang perayu ada di kediaman tersebut. Kehadirannya di kediaman tersebut pada hari kejadian sudah cukup dibuktikan dengan keterangan ini (lihat perenggan 39).

(5) Yang arif DPP telah melakukan apa yang diperlukan darinya mengikut peruntukan s 179(1) CPC. Hujahannya adalah berdasarkan pada apa yang terkandung di dalam kertas-kertas siasatan yang sedia ada padanya dan beliau secara jelas tidak boleh mengagak sama ada mahkamah akan menerima atau menolak pernyataan beramaran itu. Semasa perbicaraan tersebut, yang arif hakim telah memutuskan yang keterangan tersebut tidak boleh diterima. Setelah berbuat demikian yang arif hakim tidak lagi merujuk kepada pernyataan beramaran tersebut ataupun kandungannya di dalam alasan-alasan penghakimannya kerana ianya jelas tidak lagi merupakan sebahagian dari kes pendakwaan, kerana ianya telah diputuskan tidak boleh diterima. Di hadapan mahkamah, yang arif DPP tidak pernah merujuk kepada pernyataan beramaran tersebut dan mahkamah juga tidak memberikan sebarang pertimbangan kepadanya kerana ianya merupakan satu keterangan yang tidak boleh terima. Pernyataan beramaran tersebut secara tidak langsung telah menjadi sebahagian dari rekod rayuan dan dari itu bukanlah satu isu (lihat perenggan 42).

(6) Terdapat keterangan yang amat sangat pada rekod yang bahawa perayu membunuh si mati. Yang arif hakim telah membuat inferens yang wajar dari keterangan pendakwa raya dan telah memberi alasan-alasan yang mencukupi kenapa beliau memanggil perayu untuk memasukkan pembelaan. Keterangan secara keseluruhannya mengesahkan butiran material bahawa perayu telah membunuh si mati. Beliau berdiam diri dan tidak memanggil sebarang saksi. Dari itu, tiada keterangan pematahan. Tiada salah laksana keadilan berlaku di dalam kes ini (lihat perenggan 49).]

Notes

For cases on murder, circumstantial evidence, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 632–633.
For cases on prima facie case, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2789–2797.
For cases on prosecution's case, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2807–2808.

Cases referred to

Abdullah bin Saad v PP [1956] MLJ 92 (refd)
Arulpragasan a/l Sandaraju v PP [1997] 1MLJ 1 (refd)
Haw Tua Tau v PP [1981] 2 MLJ 49 (refd)
Idris v PP [1960] MLJ 296. (refd)
Junaidi bin Abdullah v PP [1993] 3 MLJ 217 (refd)
Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265 (refd)
PP v Choo Yee Keang [1991] 3 CLJ 2909 (refd)
PP v Lin Lian Chen [1992] 2 MLJ 561 (refd)
Subramaniam v PP [1956] MLJ 220 (refd)
Sunny Ang v PP [1966] 2 MLJ 195 (refd)
Tan Boon Teck v PP [1950] MLJ 44 (refd)

Legislation referred to

Criminal Procedure Code ss 179(1), 180
Evidence Act 1950 ss 32(1)(a), 60(1)(b)
Penal Code s 302

Karpal Singh (Karpal Singh & Co) for the appellant.
Nurulhuda Nur'ain Mohd Noor (Attorney-General's Chambers) for the respondents.

Mohd Ghazali Yusoff JCA (delivering judgment of the court):

[1] The appellant was convicted on and sentenced to death for the murder of one Usharani a/l Raja Durai ('the deceased') and was sentenced to death in accordance with s 302 of the Penal Code ('the Code'). The appellant appealed against his conviction. We dismissed the appeal, and these are our reasons for having done so.

[2] The offence was committed on 30 May 1996 sometime between 12.52pm and 2.20pm at house No 12-3A Jalan Medan Batu Caves 2, Taman Batu Caves, Selayang, Selangor ('the said residence'). The said residence was located above a shop-house. The evidence showed that the deceased and her twin sister, PW1 stayed at the said residence with their mother, PW2. The appellant is the nephew of PW7, the father of the deceased. PW2 and PW7 were divorced in 1990 and at the material time, PW7 was living elsewhere.

[3] About two months prior to the day of the incident, the appellant visited the said residence and introduced himself as PW7's nephew. He subsequently made several visits to the said residence and on one of his visits, which was sometime in April 1996, he asked for a loan of RM500 from PW2. As she did not have any

money, she loaned him two of her gold trinkets, namely, a chain and a bangle which were worth about RM1,000 ('the said gold trinkets'). He promised to return the said gold trinkets within a week but failed to do so despite reminders from PW2 and also PW1. Subsequently, on 29 May 1996, PW1 spoke to the appellant on the telephone and asked him to return the said gold trinkets. The appellant promised to return the same on 30 May 1996, ie the next day.

[4] On 30 May 1996, ie the day of the incident the appellant went to the said residence at about 8.45am but without the said gold trinkets, where he met PW1 and PW2 who were both getting ready to go to work. The appellant promised he will return to the said residence later in the day as the said gold trinkets were at the pawnshop which will only be opened for business at about 10am. PW1 woke the deceased up who was then sleeping in her bedroom and informed her that the appellant will be coming after 10am to return the said gold trinkets. Subsequently, PW1 and PW2 left the said residence together with the appellant to go to work after locking the front-door to the said residence.

[5] At about 2.20pm the same day, PW1 came home from work and found a set of house-keys to the said residence belonging to the deceased in a shoe by the side of the entrance to the front-door which was locked. She opened the door with her own set of house-keys and saw the deceased lying on the floor of her bedroom in a pool of blood with her face covered with a sarong. She then went downstairs and met two persons whom she did not know and asked them to accompany her to the said residence as she was frightened.

[6] She then took her phone-book and went downstairs again together with the two persons and went to a public telephone to call PW7. She only managed to call her brother, Mohd Mazwan who later came with a friend, PW15. Mohd Mazwan and PW15 then carried the deceased with the intention of sending her to the Kuala Lumpur General Hospital (KLGH). PW15 noticed that there was a blood-stained knife placed on the deceased's chest and saw a wound on her neck. He also noticed that the deceased was lifeless and was not breathing. In the midst of carrying the deceased, the blood-stained knife fell from her person. The knife was later identified by PW2 as her kitchen knife. When Mohd Mazwan and PW15 were about to depart, PW7 arrived and he accompanied them to the KLGH.

[7] PW19, the doctor on duty at the KLGH's emergency department on the day of the incident and who examined the deceased testified that she was dead upon arrival at the hospital at about 3pm. She certified her dead at about 3.15pm and was of the view that the time of death could have been earlier than that.

[8] The hospital's pathologist, PW21 who conducted the post-mortem at about 4.40pm on 31 May 1996 stated that there was a wound and bruises in the area of the neck and the trachea was severed which was sufficient in the ordinary course of nature to cause death. He estimated the time of death to be between 2.30pm to 3.10pm on 30 May 1996 and stated that it could also be earlier. He was of the view there had been a struggle and that strong force was used and that the weapon used seems to be a sharp object.

[9] PW7 testified that at about 12.50pm on the day of the incident, he went to the said residence with his wife, PW18 in his motorcar to pick up the deceased and PW1 to attend a wedding. He had earlier informed them that he will be arriving at about 1.30pm. Upon arrival at about 12.50pm, he made a telephone call from his handphone to the house telephone of the said residence to inform his daughters, ie PW1 and the deceased that he was waiting downstairs in his motorcar. It was the deceased who answered the telephone. He testified that the deceased informed him that PW1 was at work and that she could not come downstairs as the appellant was with her in the said residence. She requested him to come a bit later in the afternoon. PW7 then drove off to his mother-in-law's residence.

[10] Later, PW7 was informed that the deceased was found bleeding in the said residence. He then went to the said residence where he met his son, Mohd Mazwan. They then carried the deceased to his motorcar to send the deceased to the KLGH.

[11] PW2 testified that when she left for work on the day of the incident, the deceased was wearing a chain (exh P19), a locket (exh P20), a bangle (exh P32) and a ring (exh P33). When she returned home later, she found several pieces of her jewellery which she kept in her cupboard situated in her bedroom in the said residence were also missing (exhs P21–P31).

[12] In the course of police investigations, the police recovered exhs P19–P31 from a pawnshop situated in Jalan Tun HS Lee, Kuala Lumpur. That pawnshop's records showed that these items were pawned by the appellant on the day of the incident, ie 30 May 1996. The said gold trinkets which belonged to PW2 and were loaned to the appellant were also found to have been pawned by the appellant at another pawnshop on 12 April 1996.

[13] The appellant was arrested at about 2am on 31 May 1996 and was subsequently charged with the offence of murder under s 302 of the Code. At the conclusion of the case for the prosecution and after hearing submissions proffered by the learned deputy public prosecutor (DPP) and learned counsel for the appellant, the learned trial judge called on the appellant to enter on his defence. The learned trial judge's transcript of the notes of proceedings in relation to this read as follows:

> Prima facie case is established.
>
> Beyond reasonable doubt.
>
> The OKT is called to enter defence.

[14] The appellant elected to remain silent when he was called on to enter on his defence and informed the court that he did not wish to call any witness.

[15] At the conclusion of the trial the appellant was found guilty of murder as charged and was sentenced to death. The appellant appealed.

[16] Before us, learned counsel for the appellant made an issue of the finding of the learned trial judge at the close of the case for the prosecution as found in the

transcript of his notes of proceedings, reproduced above. In relation to this, learned counsel for the appellant canvassed the following arguments:

(i) the instant case was a pre-amendment case, viz, prior to the amendment of, inter alia, s 180 of the Criminal Procedure Code ('CPC') and hence the case of *Arulpragasan a/l Sandaraju v Public Prosecutor* [1997] 1MLJ 1 would apply;

(ii) you cannot have a prima facie case beyond reasonable doubt;

(iii) the finding of the learned trial judge as found in the transcript of the notes of proceedings itself is a misdirection;

(iv) the entire case was based on circumstantial evidence;

(v) the learned trial judge did not give any reason why he called upon the appellant to enter on his defence;

(vi) the opening speech of the learned DPP (exh P3 p 153 of the appeal record) cannot be supported; in his opening speech, the learned DPP stated that the appellant assaulted the deceased with intention to commit robbery in the said residence and when the deceased screamed, he cut her neck with a knife and subsequently took the various pieces of jewellery from a cupboard belonging to the deceased's mother and pawned it; he pointed that the opening speech was in line with the appellant's cautioned statement (exh ID3 p 192 of the appeal record) which had been ruled as inadmissible by the learned trial judge and hence should not form part of the appeal record;

(vii) the time of the incident as stated in the charge, ie sometime between 12.52pm and 2.20pm was inconsistent with the evidence adduced, namely:

(a) PW21, the pathologist who carried out the post-mortem said that time of death was between 2.30pm to 3.10pm;

(b) PW1, the deceased's sister informed the deceased that the appellant will be coming to the said residence at 10am to return the said gold trinkets;

(viii) there is no evidence that the appellant was in the said residence between 12.52pm and 2.20pm as stated in the charge;

(ix) the prosecution relied heavily on the testimony of PW7, the deceased's father who said on the day of the incident he came at 1.30pm to fetch the deceased and PW1; he later said he promised to fetch them at 1.30pm;

(x) whether PW7's evidence of his telephone conversation with the deceased, viz., that she was unable to come down to meet him as the appellant was in the said residence, was inadmissible; the learned trial judge has overruled the defence objection that that evidence was inadmissable under s 32 of the Evidence Act 1950;

(xi) mere presence is insufficient to sustain the charge — see *Public Prosecutor v Choo Yee Keang* [1991] 3 CLJ 2909;

(xii) there were no fingerprints on the knife to connect the appellant;

(xiii) the identity card number of the appellant at p 60 (evidence of PW14 who was a workman with the pawnshop) and p 190 (exh P70 which is the pawnshop's transactions record book) of the appeal record differs;

(xiv) whether all this circumstantial evidence is beyond reasonable doubt: see *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561 and *Idris v Public Prosecutor* [1960] MLJ 296.

[17] We are of the view that the main issue raised by learned counsel for the appellant, viz., that as this case was prior to the amendment of s 180 of the CPC, Arulpragasan would apply, is a non-issue under the circumstances of this instant appeal. Counsel had argued that the learned trial judge's finding itself is a misdirection, namely, you cannot have a prima facie case beyond reasonable doubt. We cannot find any basis for this contention to hold water for the following reasons.

[18] Prior to its amendment, which came into force on 1 February 1997, s 180 of the CPC reads:

> When the case for the prosecution is concluded the court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction shall record an order of acquittal, or, if it does not so find, shall call on the accused to enter on his defence.

[19] Section 180 of the CPC, after its amendment reads:

(1) When the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a prima facie case against the accused.

(2) If the court finds that the prosecution has not made out a prima facie case against the accused, the court shall record an order of acquittal.

(3) If the court finds that a prima facie case has been made out against the accused on the offence charged the court shall call upon the accused to enter on his defence.

[20] The appellant was charged with committing the offence of murder on 30 May 1996 and hence, s 180 of the CPC prior to its amendment would apply. In *Arulpragasan*, as gleaned from the headnotes, the Federal Court, by a majority, held:

(a) that the prosecution had to prove every ingredient of a charge and at the end of the case for the prosecution, the court should then evaluate all the admissible evidence as adduced relevant to the charge and decide whether to call an accused to enter on his defence;

(b) that under s 180 of the Code, the prosecution was obliged to make out against an accused a case which if unrebutted would warrant his conviction before the accused could be called upon to enter on his defence;

(c) since in order to convict the accused, if the case for the prosecution was not rebutted, the court must be satisfied of the guilt of the accused beyond all reasonable doubt, the court before calling the accused to enter upon his defence must be satisfied that the prosecution had made out a case against the accused beyond all reasonable doubt;

(d) therefore the standard of proof required from the prosecution at the close of its case, in a non-jury trial in Malaysia was, having regard to the statutory formula in s 180 of the CPC, the usual criminal standard of proof, to wit, the beyond all reasonable doubt standard of proof, which called for the maximum evaluation of the evidence tendered by the prosecution;

(e) 'a more rigorous test of credibility' was to be applied to the prosecution's evidence, instead of the much lower *Haw Tua Tau* standard of proof of a mere prima facie case which called for a minimal evaluation of the evidence tendered by the prosecution. (*Haw Tua Tau v Public Prosecutor* [1981] 2 MLJ 49)

[21] In *Arulpragasan*, Eusoff Chin CJ said (at pp 11–12):

> The crux of the arguments before us is centred on the interpretation of s 180 of the Criminal Procedure Code (FMS Cap 6) ('the Code') which states:
>
> 180 Procedure after conclusion of case for prosecution
>
> When the case for the prosecution is concluded the court, if it finds that no case against the accused has been made out *which if unrebutted would warrant his conviction* shall record an order of acquittal, or, if it does not so find, shall call on the accused to enter on his defence.
>
> The burden is on the prosecution to prove every ingredient which constitutes the offence with which the accused is charged. When, at the close of the case for the prosecution, every ingredient is proved, then there is a case for the accused to answer.When the case for the prosecution is concluded, it is the duty of the court to scrutinize and evaluate the evidence and to decide whether or not there is a case for the accused to answer. If there is no case to answer, the court will acquit and discharge the accused person. If there is a case to answer, then the court will call on the accused to enter on his defence. When calling the accused to enter on his defence, three alternatives are open to the accused by which he can rebut the case for the prosecution. These must be explained to the accused, and they are: (i) he can give evidence on oath from the witness box and be subject to cross-examination, or (ii) he can give an unsworn statement from the dock, or (iii) he can remain silent. Whatever alternative he elects, he is at liberty to call his witness or witnesses to testify on his behalf.Assuming that the accused person elects to remain silent and does not wish to call any witness or produce any document for his defence, then he will have failed to rebut the evidence adduced by the prosecution and the court must be prepared, there and then, to convict the accused person of the offence charged. This is the requirement of s 180 of the Code.The question of major importance before the court is: What is the standard of proof required of the prosecution at the close of its case having regard to the provisions of s 180 of the Code? Is it proof beyond reasonable doubt, or is it a mere prima facie supposition that the accused person may be guilty of the offence charged?It is trite law that the onus is on the prosecution throughout the case in any criminal trial to prove the charge against the accused beyond reasonable doubt. In my view, the same standard of proof applies at the intermediate stage of the trial, ie at the close of the prosecution. My interpretation of s 180 of the Code leads to the same conclusion appears in the judgment of Edgar Joseph Jr FJ, that is, the standard of proof required on the prosecution at all stages of the hearing is one of beyond reasonable doubt.

[22] On the same issue, Lamin PCA in Arulpragasan said (at p 14):

To translate his Lordship's words in correspondence with those in s 180, for myself I would say that what he had in mind was that on weighing the evidence at the end of the prosecution case and upon such evidence standing alone meaning 'if unrebutted', it would be wholly unsafe to convict upon such evidence meaning 'no case has been made out if unrebutted it would warrant his conviction' (and that would amount to no prima facie case has been made out) and the accused should not be called to enter his defence. Section 180 stipulates that there is only one standard of proof throughout the prosecution case. Conversely, that must mean that at that stage, ie at the close of the prosecution case, if it would be safe to convict on the evidence for the prosecution, then and only then would the accused be called to enter his defence. This answers the second limb of s 180. This means that the prosecution has to prove every ingredient of the charge and at the end of the case for the prosecution, the court shall then evaluate all the admissible evidence as adduced relevant to the charge and decide whether to call or not to call the accused to enter his defence. Puan Zaitun Zawiyah in her written submission seems to say that the words 'made out' found in s 180 of the Code do not mean 'proved' for as therein stated thus 'if a case against him has been made out (and not proved)'. This can be misleading because the prosecution has to prove its case beyond reasonable doubt. If at the end of the case for the prosecution, the accused is called upon to enter his defence and he opts to remain silent, then he shall be found guilty forthwith. So for the court to decide to call the accused to enter his defence, there must be the kind of evidence before it upon which it is entitled to make up its mind that the accused has committed the offence and to find him guilty forthwith if no evidence from the accused is forthcoming. That is the kind of evidence that must be available before the court at the close of the prosecution case. That suggests that it requires the court, if I may borrow the expression in *Khoo Hi Chiang*, to undertake a maximum evaluation of the evidence (*Khoo Hi Chiang v Public Prosecutor* [1994] 1 MLJ 265).

[23] In *Arulpragasan*, Edgar Joseph Jr FCJ said (at p 42):

Another example which helps to further illustrate the point that there is a fundamental difference between applying a mere 'prima facie' standard of proof and the 'beyond all reasonable doubt' standard of proof, at the intermediate stage of the trial, would be where, at the conclusion of the prosecution's case, there is strong prosecution evidence but there remains a reasonable tenable doubt. In such a situation, if the standard of proof is a mere 'prima facie case', in other words, a mere prima facie supposition that the accused may be guilty, then also the trial must proceed, and the defence would have to be called. On the other hand, if the standard of proof is 'beyond all reasonable doubt', then, in the situation just mentioned, the prosecution will have failed to satisfy the test, and the accused would have to be acquitted and discharged without his defence being called.Furthermore, if the onus on the prosecution at the close of its case, is to establish a 'mere prima facie case', the test to be applied is a minimal evaluation of the prosecution's evidence to ensure that it is not inherently incredible (see *Haw Tua Tau v PP*). Whereas, if the onus on the prosecution at the close of its case, is to establish a case 'beyond all reasonable doubt', then the test to be applied to the prosecution's evidence is a maximum evaluationof the prosecution's evidence, which calls for 'a more rigorous test of credibility' (per Lord Diplock in Haw Tua Tau at p 54G), in order to answer the question: if there is no more evidence, has the prosecution proved its case beyond all reasonable doubt? (See *PP v Fong Ah Tong & Anor* [1940] MLJ 240).

[24] Thus, the above was the position before the amendment to s 180 of the CPC came into force on 1 February 1997.

A **[25]** In his grounds of judgment, the learned trial judge in the instant appeal said at the conclusion of the case for the prosecution, upon evaluating the evidence adduced, he found that the prosecution has succeeded in proving its case beyond reasonable doubt as required under s 180 of the CPC and it was for that reason that he called on the appellant to enter on his defence. In his grounds of judgment, which were prepared in the Malay language, in relation to this, he said:

B

> Oleh hal yang demikian, dari beberapa keterangan ikut keadaan seperti yang diterakan yang diatas, kesan kumulatifnya yang telah dibuktikan menunjukkan dengan jelasnya kepada satu kesimpulan dan satu kesimpulan sahaja iaitu bahawa tertuduh melakukan pembunuhan dalam kes ini melampaui keraguan munasabah. Kerananya atas penilaian keterangannya yang dikemukakan pada penutupnya kesnya pihak pendakwa telah berjaya membuktikan kes terhadap tertuduh melampaui keraguan munasabah seperti yang dikehendaki di bawah s 180 Kanun Acara Jenayah. Kerananya saya memanggil si tertuduh untuk membela diri.

C

Translated into the English language, it would read as follows:

D

> Accordingly, from circumstantial evidence as discussed above, the cumulative effect which has been proved clearly shows to one conclusion and one conclusion only, that is, that it was the accused in this case who committed murder beyond reasonable doubt. Upon evaluating the evidence adduced at the close of its case the prosecution has succeeded in proving its case beyond reasonable doubt as required under s 180 of the *Criminal Procedure Code*. For that reason I called upon the accused to enter on his defence.

E

[26] The above, being his finding, was clearly in consonant with what has been held by the majority in *Arulpragasan*. *Arulpragrasan* was also cited to him during submissions at the close of the case for the prosecution. What learned counsel in the instant appeal seems to be harping on is that the learned trial judge used the words 'prima facie' in his transcript of his notes, reproduced earlier. We cannot see how that **F** can be fatal when his grounds of judgment clearly showed he understood what was required of him under s 180 of the CPC as it then was and that he religiously followed the decision of *Arulpragasan* which was clearly binding on him. Thus, a judge sitting alone under s 180 of the CPC must subject the prosecution evidence to maximum evaluation at the close of the case for the prosecution and ask **G** himself the question, viz., if he decide to call upon the accused to enter his defence and he elects to remain silent, is he prepared to convict him on the totality of the evidence contained in the prosecution's case. This, according to *Arulpragasan*, is the requirement of the s 180 of the CPC. As such, we cannot also see where the learned trial judge had misdirected himself. We have carefully perused his grounds of **H** judgment and we find that the learned trial judge had, at the close of the case for the prosecution, made an evaluation of all the admissible evidence as adduced relevant to the charge of murder under s 302 of the Code. He then found that the prosecution had proved every ingredient of the charge of murder and hence had made out against the appellant a case which if unrebutted would warrant his conviction. That was when he called upon the appellant to enter on his defence.

I

[27] The next issue raised by learned counsel for the defence was that the entire case was based on circumstantial evidence and the question is whether all this circumstantial evidence is beyond reasonable doubt.

[28] The appellant was charged with murder and hence the prosecution must therefore prove the following ingredients:

(i) that the death of Usharani a/l Raja Durai had taken place;

(ii) that her death had been caused by or in consequence of the act of the appellant; and

(iii) such act was done with the intention either of causing death or of causing bodily injury sufficient in the ordinary course of nature to have caused her death.

[29] It is not in dispute that the first ingredient has been proved. With regards to the second and third ingredients, the prosecution had adduced the following evidence:

(i) the appellant is the nephew of PW7, the deceased's father;

(ii) prior to the incident the appellant made several visits to the said residence;

(iii) sometime in April 1996 the appellant requested for a loan of RM500 from PW2; as she did not have any money she loaned him her gold chain and bangle, ie the said gold trinkets;

(iv) on 12 April 1996, the appellant pawned the said gold trinkets for the sum of RM400 with the Thye Poh pawnshop at No 22, Jalan Sri Selayang; the pawnshop records showed that the said gold trinkets would have to be redeemed by 25 October 1996 (evidence of PW23 supported by the pawnshop's record book (exh P70));

(v) on 30 May 1996, ie the day of the incident the appellant went to the said residence at about 8.45am where he met PW1 and PW2 and promised to return the said gold trinkets after 10am as the pawnshop will only be opened for business at 10am; the appellant then left the said residence together with PW1 and PW2 who were going to work whilst the deceased remained in the said residence;

(vi) PW2 testified that the deceased was wearing a gold chain (exh P19), a locket (exh P20), a bangle (exh P23) and a ring (exh P33) when she (PW2) left for work on the day of the incident;

(vii) at about 12.50pm on the day of the incident, PW7 and PW18 went to the said residence to pick up the deceased and PW1 to attend a wedding; he waited downstairs in his motorcar and made a call from his handphone (No 017-8820906) to the house telephone of the said residence (No 03-6850916) to inform the deceased or PW1 that he was waiting downstairs; the deceased answered the telephone and informed him that PW1 was at work and that she could not come downstairs to meet him as the appellant was in the said residence;

(viii) PW7 left after the deceased requested that he come later in the afternoon; PW18, ie PW7's wife who was present in the motorcar when the conversation between PW7 and the deceased took place confirmed that such conversation took place and that she also spoke to the deceased on PW7's handphone; that

the telephone call was made is further corroborated by PW7's handphone bill (exh P49) and the evidence of PW11, a senior executive from Sapura Digital, the service provider with which PW7's handphone was registered with, namely, that such a call was made from PW7's handphone to telephone No 03-6850916 at 12.52pm on 30 May 1996, viz., the day of the incident;

(ix) at about 2.20pm on the day of the incident PW1 came home from work and discovered the deceased's set of house-keys in a shoe by the side of the front-door of the said residence; she then entered the said residence and found the deceased lying on the floor in her bedroom in a pool of blood; later a blood-stained knife identified by PW2 as her kitchen knife (exh P9) was discovered on the deceased's person by PW15 who came with PW1's brother, Mohd Mazwan to assist in carrying the deceased to send her to the KLGH;

(x) PW21 who conducted the post-mortem on the deceased stated there was a wound and bruises in the area of the deceased's neck and the trachea was severed which was sufficient in the ordinary course of nature to cause death; he opined that the weapon used seemed to be sharp object and was of the view that there was a struggle and that only one person was involved;

(xi) several pieces of jewellery kept in the said residence and belonging to PW2 including the ones worn by the deceased on the day of the incident were discovered to be missing after the incident and in the course of police investigations were discovered to have been pawned by the appellant with a pawnshop trading under the business name of Foo Shing Tong (Hup Kee), No 94, Jalan Tun HS Lee, Kuala Lumpur; the pawnshop's records (exh P65) showed that the same were pawned by the appellant on the day of the incident (exhis P19 to P31);

(xii) there was no sign of any forced entry to the said residence which would denote that the deceased allowed the appellant to enter the said residence as she was expecting him to return the said gold trinkets.

[30] The question that the learned trial judge had to answer, depending as it does on circumstantial evidence, was whether the cumulative effect of all the above evidence leads to the irresistible conclusion that it was the appellant who committed the crime (see *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195). In *Sunny Ang*, Tan Ah Tah Ag CJ said (at p 198):

> It was also contended that the learned trial judge erred in law in failing adequately to direct the jury on the danger of convicting an accused person upon circumstantial evidence. There are two passages in the summing-up which are relevant in this connection. The first passage, which comes after the direction in which the learned trial judge deals with what he refers to as the first question of the cumulative effect of circumstantial evidence, is as fellows:
>
> > The second question to which I must draw your attention is that the question in this case, depending as it does on circumstantial evidence, is whether the cumulative effect of all the evidence leads you to the irresistible conclusion that it was the accused who committed this crime. Or is there some reasonably possible explanation such, for example — 'Was it an accident?'.

[31] The second passage is as follows:

> Now, as I told you earlier on, one of the points about circumstantial evidence is its cumulative effect. Any one of these points taken alone might, you may think, be capable of explanation. The question for you is: where does the totality of them, the total effect of them, all lead you to? Adding them together, considering them, not merely each one in itself, but altogether, does it or does it not lead you to the irresistible inference and conclusion that the accused committed this crime? Or is there some other reasonably possible explanation of those facts?
>
> The prosecution case is that the effect of all this evidence drives you inevitably and inexorably to the one conclusion and one conclusion only: that it was the accused who intentionally caused the death of this young girl.'
>
> In our opinion, these directions are perfectly adequate in a case where the prosecution are relying on circumstantial evidence.

[32] In the instant appeal, the evidence relied upon by the prosecution was circumstantial. We are of the unanimous view that the totality of the evidence, adding them together and considering them altogether, lead to the irresistible conclusion that it was the appellant who committed the crime. We cannot find any other reasonably possible explanation. The learned trial judge was correct in arriving at the decision that he did when he called on the appellant to enter on his defence. The learned trial judge pointed out in his judgment that there is a complete chain of circumstantial evidence which links the appellant beyond reasonable doubt with the act of killing and establishes the offence charged. His judgment indicates that he viewed the evidence as a whole.

[33] An appeal is merely a continuation of the trial and throws open all the evidence to re-examination in order to determine whether or not the various findings of the trial court are correct (see *Tan Boon Teck v Public Prosecutor* [1950] MLJ 44). It can be inferred from the evidence that the appellant was in need of money. He approached PW2 for the purpose of borrowing money. He was even willing to borrow the said gold trinkets when PW2 informed him that she did not have the cash and consequently pawned them on 12 April 1996. It is not disputed that he did visit the said residence on the morning of the incident without the said gold trinkets where he met PW1 and PW2. He left the said residence after promising that he will return with the said gold trinkets after getting it back from the pawnshop. The evidence does not indicate that the said gold trinkets were redeemed that day.

[34] Consequently, the evidence of PW7 which was corroborated by PW18 and PW11 showed that he made a call from his handphone to the house telephone of the said residence at about 12.52pm on the day of the incident whilst sitting in his motorcar. He spoke to the deceased and this was corroborated by PW18 who was present in the motorcar. She heard PW7 conversing with the deceased. PW7 then passed to her his handphone and she spoke to the deceased. The deceased informed her that she could not come downstairs to meet her as the appellant was in the said residence. The deceased requested that she come again later to take her at about 6.30pm. Subsequently, she asked PW7 as to why the deceased would not meet them downstairs and he informed her that it was because the appellant was in the said

residence. This evidence denote that the deceased was still alive at 12.52pm on the day of the incident and that the appellant was present in the said residence at that time.

[35] Learned counsel for the appellant argued that PW7's evidence of his telephone conversation with the deceased, viz, that she was unable to come down to meet him as the appellant was in the said residence was inadmissible under s 32 of the Evidence Act 1950 but his objection as such was overulled by the learned trial judge. We are of the unanimous view that the learned trial judge was correct in law in overulling such an objection. The statement made by the deceased to PW7, viz, that she could not come downstairs to meet him as the appellant was in the said residence is by itself a relevant fact and to that effect becomes relevant under the express provisions of s 32(1)(a) of the Evidence Act 1950 which reads:

> (1) Statements, written or verbal, of relevant facts made by a person who is dead... are themselves relevant facts in the following cases:
>
> (a) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such a statement is relevant whether the person who made it was or was not at the time when it was made under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;....

[36] PW7's evidence in relation to the above is not hearsay and is admissible as it was proposed to establish the fact that the statement, ie that the appellant was in the said residence, was made and not the truth of the statement. In the oft cited Privy Council case of *Subramaniam v Public Prosecutor* [1956] MLJ 220, which dealt with a similar circumstance, Mr LMD De Silva said (at p 222):

> In ruling out peremptorily the evidence of conversation between the terrorists and the appellant the trial judge was in error. Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and is inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made.

[37] In the instant appeal, the learned trial judge admitted the evidence in relation to the conversation between PW7 and the deceased pursuant to s 60(1)(b) of the Evidence Act 1950 which reads:

> (1) Oral evidence shall in all cases whatever be direct, that is to say —
>
> (b) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;.

[38] We cannot see where the learned trial judge has gone wrong. PW7 said he heard the deceased's statement that the appellant was in the said residence at that material time. His evidence is direct oral evidence and is a relevant fact. In our view the evidence of PW7 was rightly admitted. We cannot fathom how it can be argued that such evidence is inadmissible. The evidence clearly showed that the appellant was in the said residence at about 12.52pm on the day of the incident.

[39] We are also of the view that the evidence that showed that the jewellery found missing were pawned by the appellant would constitute corroboration. The evidence confirmed in material particulars that the appellant was there in the said residence. His presence in the said residence on the day of the incident was sufficiently proved by this evidence. In relation to this, our attention was drawn to the case of *Abdullah bin Saad v Public Prosecutor* [1956] MLJ 92. In that case, the appellant was convicted of murder of an old fowl-seller and was sentenced to death. The deceased met his death on 15 May 1955 and on 17 May 1955 his body was discovered. It was proved that on 16 May 1955 the appellant pawned some jewellery which belonged to the deceased. Apart from this piece of evidence, there was nothing to connect the appellant with the crime. On appeal, the Court of Appeal held the only evidence to connect the appellant with the killing was the pawning of two pieces of jewellery, the property of the deceased, and it was not certain that they were on the deceased's person on the day of his death; this did not supply sufficient evidence on which to found a conviction for murder and therefore the conviction must be set aside. In delivering the judgment of the court, Matthew CJ referred to *Wills on Circumstantial Evidence*. He said (at pp 92–93):

> *Wills on Circumstantial Evidence* (7th Ed), p 104 has the following passage:
>
> > The possession of stolen goods recently after the loss of them, may be indicative not merely of the offence of larceny, or of receiving with guilty knowledge, but of any other more aggravated crime which has been connected with theft. Upon an indictment for arson, proof that property which was in the house at the time it was burnt, was soon afterwards found in the possession of the prisoner, was held to raise a presumption that he was present at, and concerned in, the offence; *R. v Rockman* (1789) 2 East PC p1035, and see *R. v Fuller* (1816) R & R 308. This particular fact of presumption commonly forms also a material element of evidence in cases of murder; which special application of it has often been emphatically recognised. It is upon the same principle that a sudden and otherwise inexplicable transition from a state of indigence and a consequent change of habits or a profuse or unwanted expenditure inconsistent with the position in life of the party, is sometimes a circumstance extremely unfavourable to the supposition of innocence (*R v Burdock*) (murder by poison) Bristol Assn Ap 1835, Cor: Sir Charles Wetherell, Recorder.
>
> > But the rule must be applied with discrimination, for the bare possession of stolen property, though recent, uncorroborated by other evidence, is sometimes fallacious and dangerous as a criterion of guilt.
>
> In the present case, the only evidence to connect the appellant with the killing is the possession of two pieces of jewellery, the property of the deceased, and it is not certain that they were on the deceased's person on the day of his death. In our view, this did not supply sufficient evidence on which to found a conviction for murder, and we accordingly allowed the appeal and directed that the appellant should be discharged.

[40] In the instant appeal before us, the fact that the appellant pawned the gold trinkets worn by the deceased and PW2's jewellery which were found missing from her cupboard in her bedroom was not the only evidence to connect the appellant with the killing which was the case in *Abdullah bin Saad*. The appellant had clearly come into possession of the gold trinkets worn by the deceased on the day of the incident and PW2's jewellery which were kept in a cupboard in her bedroom and discovered by PW2 to be missing on the day of the incident when she came home. The evidence clearly showed that the appellant pawned them on the day of the incident. There was other evidence, as discussed earlier, which when considered together upon a maximum evaluation formed a complete chain of circumstantial evidence which linked the appellant beyond reasonable doubt and established the offence of murder with which he was charged.

[41] We also cannot see any merit in relation to the complaint by counsel with regards to the opening speech of the learned DPP which he contended cannot be supported, viz., that the opening speech was in line with the appellant's cautioned statement and which had been ruled as inadmissible. Section 179(1) of the CPC provides as follows:

> The officer conducting the prosecution shall open case by stating shortly the nature of the offence charged and the evidence by which he proposes to prove the guilt of the accused.

[42] The learned DPP had carried out what was required of him pursuant to s 179(1) of the CPC. His speech was based upon what was contained in the investigation papers that was available to him and he was clearly not in a position to anticipate whether the court would admit or reject the cautioned statement. In the course of the trial, the learned trial judge ruled that it was inadmissible. Having done so the learned trial judge never referred to the cautioned statement or its contents in his grounds of judgment as it clearly did not form part of the case for the prosecution, it being ruled to be inadmissible. The appeal record was prepared by the court staff. We do not know why it was included in the appeal record. The prosecution surely cannot be faulted for this. Furthermore, before us, the learned DPP never referred to the cautioned statement neither did we give any due consideration to it as it is a piece of inadmissible evidence. We are of the view that it was inadvertently included in the appeal record and as such is a non-issue.

[43] Learned counsel also pointed out the following inconsistencies in the case for the prosecution, namely:

(i) that PW21 who carried out the post-mortem said that the time of death was between 2.30pm to 3.10pm whereas the charge stated that the offence was committed between 12.52pm and 2.20pm;

(ii) that the identity card number of the appellant at p 60 of the appeal record differ from that at p 180 of the appeal record.

[44] We are of the view that the above are non-issues. In his evidence, PW21 who carried out the post-mortem at about 4.40pm on 31 May 1996, ie more than 24 hours after the body was brought to the GHKL opined that the deceased died on

30 May 1996 between 2.30pm to 3.10pm but he also said that this was only an estimate and that there was a possibility that she died earlier (p 76 of the appeal record). The evidence showed that on the day of the incident PW7 spoke to the deceased on the telephone at 12.52pm whilst PW1 returned to the said residence at about 2.20pm and that was when she discovered the deceased lying in a pool of blood in her bedroom. What can clearly be inferred is that she must have died between 12.52pm and 2.20pm. She was bought to the GHKL at about 3pm. PW19, the doctor on duty said she was dead upon arrival and she certified her dead at about 3.15pm but opined that the time of death could have been earlier than that. As such we cannot see how this can be an issue.

[45] On the second issue, we have perused very carefully the appeal record. A copy of the identity card of the appellant (p 190 of the appeal record) showed that its number is 'A 3626850'. Exhibit P65 which is a transactions record book of the pawnshop where the appellant pawned the gold trinkets worn by the deceased and PW2's jewellery, ie exhs P19–P31 on the day of the incident also showed that his identity card number was recorded as 'A 3626850'. In the notes of proceedings as recorded by the learned trial judge, PW14 who was a workman at the pawnshop was referred to exh P65. She was the person who recorded the particulars of the appellant when he pawned the gold trinkets worn by the deceased and PW2's jewellery. She stated in examination-in-chief that the person who pawned the items was a male Indian by the name of Muniandy. The learned trial judge's transcript of the notes of proceedings (p 60 of the appeal record) showed that he recorded the identity card number of 'Muniandy' as 'A 3626821'. The pawnshop's records clearly showed the correct number of the identity card of the appellant. From our reading, the learned trial judge must have either misheard the witness and transcribed the last two digits of the identity card as '21' instead of '50' or it was a typo error. Either way, we cannot see how that can be fatal as exh P65 showed the correct identity card number of the appellant.

[46] Learned counsel for the appellant had also complained that the learned trial judge did not give any reason as to why he called on the appellant to enter on his defence as can be seen from the learned trial judge's transcript of the proceedings. Again we find that this is a non-issue. There is no statutory provision requiring a judge sitting alone to expressly record his reason before calling the accused to enter on his defence or to state his findings on the credibility of the main prosecution witness and this was so held by the Supreme Court in *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217. It is clearly not a requirement of the law. In *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265, in relation to same argument raised, Edgar Joseph Jr SCJ had this to say (at p 292):

> Then it was said that the judge when calling for the defence, had failed to have the attention of the defence called to the principal points in the evidence for the prosecution which told against them, with the result that the appellants had to take 'a shot in the dark', as it were, without having the benefit of knowing the facts or the law which weighed on the mind of the court when concluding that there was a case to answer.
>
> It is a clear and widely known requirement of s 257(i) of the Code that in a trial in the subordinate courts, if, and when, the court calls upon the defence of an unrepresented accused, it shall inform him of his right to give evidence and, if he so elects, to call his

attention to the principal points in the evidence for the prosecution which tell against him so that he might have the fullest opportunity of explaining them.

> An omission to comply with this requirement, which has occasioned a miscarriage of justice, will lead to the conviction being quashed (see *Shaari v PP* [1963] MLJ 22).
>
> The present appeals are concerned with trials in the High Court in respect of which there is no provision equivalent to s 257(i) of the Code. But, more importantly, the appellants were both represented by experienced counsel, neither of whom had applied to the court to state its reasons for calling for the defence, no doubt because those reasons must have been self-evident to them. Had such an application been made, it would have had to be considered on its merits and the court would then have had to exercise its own discretion in deciding whether or not to accede to it.
>
> Here, the record provided shows no trace of either appellant having suffered any prejudice by reason of the judge's omission to explain the principal points in the evidence for the prosecution which told against the appellants. We must therefore hold that there is no substance in this ground of appeal.

[47] We are of the unanimous view that it was plain on the face of the record that at the close of the case for the prosecution, a case under s 302 of the Penal Code has been made out against the appellant which if unrebutted would have warranted the appellant's conviction. The prosecution has proved all the ingredients on a charge of murder. As such we find that the learned trial judge was correct in calling on the appellant to enter on his defence at the close of the case for the prosecution. When called upon to do so, the appellant elected to remain silent after the three alternatives were explained to him and understood by him. He informed the court that he did not wish to call any witnesses. The learned trial judge accordingly found him guilty and convicted and sentenced him to death.

[48] The learned trial judge was satisfied upon conducting a maximum evaluation which led to the irresistible conclusion that the appellant committed the offence he was charged with. In *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, Mohamed Azmi SCJ at p 497:

> Thus, under s 180, the judge must ask himself on the basis of credible evidence, a mere hypothetical question: 'If I were to accept the prosecution's evidence as accurate, would it establish the case against the accused beyond a reasonable doubt?'. Putting it in the 'prima facie case' form: 'On the assumption that the prosecution's evidence was accurate, could the accused be lawfully convicted?'. If the answer to either question is in the affirmative, then a case is said to have been made out which, if unrebutted; would warrant a conviction, and in such a case the accused should be called upon to state his defence. It must necessarily follow that if the accused elected to remain silent and called no evidence the court must convict him since the hypothetical position obtained pursuant to section 180 that prosecution evidence would not and could not be rebutted, has become a reality (see *Public Prosecutor v Man bin Abas* [1935] 1 MLJ 160).

[49] In the instant appeal, we find there is overwhelming evidence on the record that the appellant murdered the deceased. The learned trial judge has drawn the proper inferences from the prosecution's evidence and has given adequate reasons as to why he called on the appellant to enter on his defence. The evidence in its totality

confirmed in material particulars that it was the appellant who murdered the deceased. He remained silent and did not call any witness. Thus, there was no rebuttal evidence. No miscarriage of justice has occurred in this case and hence we dismissed the appeal and affirmed the decision of the learned trial judge. The death sentence is affirmed.

[50] This was a unanimous judgment. Our learned brother, Abdul Kadir Sulaiman JCA however has since retired when this judgment of the court was prepared and he did not have the benefit of reading it.

Appeal dismissed.

Reported by Loo Lai Mee